

Claimant filed an unemployment claim after losing her full-time assistant bank manager job at a bank, where she'd worked for 41 years. She continued to work 20 hours a week at a coffee shop, which she co-owned. Held the claimant was not obligated to layoff or refrain from hiring new coffee shop workers in order to schedule herself for full-time hours, as the coffee shop work was not suitable full-time work, given her tenure, experience, and higher salary in the field of banking. She was eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0074 8932 80

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from a full-time position with another employer and filed a claim for unemployment benefits with the DUA, effective January 9, 2022. The DUA denied benefits in a determination issued on February 4, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 27, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in partial unemployment within the meaning of the unemployment statute and, thus, she was disqualified pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant, a former assistant bank manager, was not in partial unemployment because she chose not to perform full-time hours of work in a coffee shop, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. On March 23, 1981, the claimant started working for the 1st employer's establishment, a bank, on a full-time basis. The claimant worked 40 hours per week for this employer. The claimant was scheduled to work for this employer

Monday through Wednesday and Friday from 8 a.m. until 4:30 p.m. and on Saturday from 8:30 a.m. until 1 p.m. The claimant's most recent job title with this employer was Assistant Manager. The claimant's most recent rate of pay with this employer was \$25.64 per hour. This employer provided the claimant with benefits such as a 401K and a pension.

2. The instant employer's establishment is a coffee shop.
3. The claimant decided to purchase the instant employer's establishment to provide her children with a financial future.
4. In 2005, the claimant purchased the instant employer's establishment with the 1st Owner.
5. The claimant and the 1st Owner had a romantic relationship in addition to the business partnership until about 7 years ago. About 7 years ago, the romantic relationship ended between the claimant and the 1st Owner. They continued with the business relationship for a period of time. They owned the business equally.
6. The claimant initially was not being paid by the instant employer's establishment as a W-2 worker. The claimant initially was only performing owner related tasks such as paying bills, coordinating payroll, and coordinating municipal requirements. The claimant sometimes helped out at the instant employer's establishment in cleaning roles, and customer service roles if the instant employer's establishment was short staffed.
7. In April 2020, the claimant started being paid as a W-2 worker for the instant employer's establishment in a part-time role. The claimant started working part-time for the instant employer at this time due to staff shortages in connection with the [COVID]-19 pandemic. The claimant is paid \$15.00 per hour by the instant employer in this part-time role. In the part-time role, the claimant performs tasks such as customer service, cleaning, and ordering supplies. In this part-time role, the claimant usually works 20 hours per week for the instant employer. The claimant's schedule varies weekly. The claimant sets the schedule.
8. The claimant does not receive any additional benefits while working for the instant employer such as a 401K or a pension.
9. About two years prior to the hearing, the claimant started also working part-time for the 2nd employer as a Personal Care Attendant for her elderly mother. In this role, the 2nd employer, a Third-Party Administrator, pays the claimant \$17.71 per hour to care for her mother. The claimant works 9 hours per week in this role.

10. At the end of calendar year 2021, the 2nd Owner purchased the 1st Owner's portion of the instant employer's establishment. The 2nd Owner is the claimant's son. The 2nd Owner does not work as a W-2 worker for the instant employer's establishment.
11. Prior to filing an initial claim for unemployment benefits, the claimant was working for the 1st employer on a full-time basis and the instant employer and the 2nd employer on a part-time basis simultaneously.
12. The claimant's last date of work for the 1st employer's establishment was on January 11, 2022. The 1st employer's establishment discharged the claimant from work.
13. The claimant filed an initial unemployment claim effective the week beginning January 9, 2022. The claimant decided to file for unemployment benefits at this time as she was discharged from the 1st employer's establishment.
14. The claimant is physically capable of working full time.
15. The claimant has continued to work part-time for the instant employer's establishment since the week beginning January 9, 2022. The claimant usually works 20 hours per week for the instant employer performing cleaning tasks, customer service tasks, and ordering supplies which the claimant is paid as a W-2 worker. The claimant has also continues [sic] to perform ownership duties for the instant employer without being paid for approximately 2 hours per week.
16. The claimant's earnings statement issued on January 14, 2022 for the earnings period running from January 7, 2022 through January 13, 2022 list the claimant worked 30 hours for the instant employer. The claimant worked 30 hours this week as the claimant was covering for another worker [sic] needed time off from work.
17. The instant employer's establishment has 4 other workers in addition to the claimant. These workers perform the same tasks that the claimant does in her paid W-2 role for the employer. Two of the workers work anywhere from 37-40 hours per week for the instant employer. The other two workers work anywhere from 15-20 hours per week for the instant employer. The claimant has hired new workers into these roles.
18. The instant employer's establishment would have full-time hours available for the claimant if the claimant decided to lay off the other workers or not hire new workers. The claimant has decided not to lay the other workers off and decided to hire other workers as the claimant wants to make sure others are provided with a paycheck and help these other workers.

19. The claimant has also continued to work as a Personal Care Attendant for the 2nd employer caring for her mother 9 hours per week since filing for unemployment benefits.
20. The claimant has been looking for full-time work with other employers since filing for unemployment benefits. The claimant is available for full-time work with other employers.
21. The Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) and 1(r) of the Law commencing the week beginning January 9, 2022 and until she met the requirements of the Law. The claimant appealed the Notice of Disqualification.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

G.L. c. 151A, § 29, authorizes benefits to be paid only to those in "total unemployment" or "partial unemployment." These terms are, in turn, defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .
- (2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work. . . .

Thus, to be eligible for benefits, a person must be capable of, available for, and actively seeking but unable to obtain, full-time suitable work.

In the present case, the findings show that the claimant worked part-time during her benefit year, including 20 hours a week for the employer coffee shop and nine hours a week as a personal care assistant (PCA). *See* Findings of Fact ## 7, 9, and 15. Since she was working some hours, we agree that she was not in total unemployment. The question before us is whether she was in partial unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1).

The findings show that she was capable of, available for, and actively seeking full-time work. *See* Findings of Fact ## 14 and 20. However, the review examiner concluded that the claimant was not in unemployment, because she was not accepting full-time work from the coffee shop, even though the claimant could make those hours available to her as an owner. She chose to schedule herself for only 20 hours per week and employ others to perform the rest of the work. Specifically, the review examiner found that the coffee shop would have full-time hours available to the claimant if she laid off other workers or did not hire new workers to perform the rest of the work. *See* Findings of Fact ## 7, 17, and 18.

However, to be in partial unemployment, a claimant need only be unable to obtain suitable full-time hours of work. Suitability itself “is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances.” Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948). The Legislature has specifically provided that the suitability of employment shall be determined by considering several factors, including the training and experience of a worker and the worker’s accustomed remuneration. *See* G.L. c. 151A, § 25(c); Pacific Mills, 322 Mass. at 349-350.

Prior to filing her claim for benefits, the claimant worked full-time as an assistant bank manager for another employer. She had worked at the bank for 41 years, much longer than she had worked at the coffee shop, and she was paid considerably more money as an assistant bank manager than for her hourly coffee shop work. She earned \$25.64 per hour plus full benefits for the bank, compared to \$15.00 per hour for the coffee shop. *See* Findings of Fact ## 1 and 7.¹ Based on these factors, we conclude that the claimant’s work for the instant employer coffee shop was subsidiary to her full-time work with the bank. Moreover, during the hearing, the claimant explained that, in her bank position, she was a supervisor, conducted audits, opened accounts, and provided and closed loans. She testified that her field was banking, not serving coffee and bagels. Accordingly, she has been searching for full-time work that matches her experience, primarily in banking.²

In light of the fact that the work for the instant coffee shop employer was subsidiary to her full-time work, it is not in her usual occupational field, and it offered less money than her customary work, the choice not to work full-time for this employer is not disqualifying. An offer of full-time work from the instant employer was, essentially, unsuitable for this claimant. *See* Board of Review Decision 0012 3564 87 (Oct. 10, 2014) (carpenter not disqualified pursuant to G.L. c. 151A, §§ 29 and 1(r), when he declined additional hours from his part-time subsidiary employer, as it was not suitable full-time employment, because the offered work paid several dollars less per hour than his customary work and was outside his usual occupational field).

We, therefore, conclude as a matter of law that the claimant was in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

¹ DUA’s electronic record-keeping system, UI Online, shows reported base period wages of \$66,521.93 from the bank and \$11,850.00 from the coffee shop.

² While not explicitly incorporated into the review examiner’s findings, the claimant’s testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 9, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 2023



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

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